

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

Public Version

In the Matter of

RAMBUS INCORPORATED,

a corporation.

Docket No. 9302

**OPPOSITION TO RAMBUS INC.'S REQUEST FOR RECONSIDERATION
AND/OR CLARIFICATION OF MAY 13, 2003, ORDER
REGARDING DOCUMENTS FOR WHICH RAMBUS ASSERTS PRIVILEGE**

Through its Request for Reconsideration and/or Clarification of the May 13, 2003, Order Regarding Rambus's Privileged Documents (filed May 19, 2003) ("Rambus Mem."), Rambus asks for reconsideration of an issue that has already been briefed, re-briefed, and re-briefed yet again. Motions for reconsideration, especially on issues as important as attorney-client privilege, are properly taken seriously. Motions for reconsideration, however, even when concerning attorney-client privilege, must meet a high threshold to warrant reopening matters that already have been fully briefed and ruled upon multiple times. That threshold has not been met in this case. Indeed, Rambus's Memorandum fails to identify any substantial basis that would justify reconsideration of this matter yet again.

Rambus has failed to demonstrate that the May 13, 2003, Order on Reconsideration of Complaint Counsel's Motion to Compel Discovery Relating to Subject Matters for Which Respondent Asserts Privilege ("Waiver Order") contains any clear error, creates any manifest injustice, or predates any material change in law or discovery of new evidence. For these

reasons alone, reconsideration simply is not appropriate. Even if reconsideration were appropriate, Rambus has failed to provide any persuasive argument to demonstrate that the Waiver Order reached an incorrect result.

hand, Complaint Counsel would not object to two minor clarifications of the Waiver Order to address issues raised by Rambus. First, Rambus has asked for clarification of the Order insofar as it provides that Rambus may assert work-product protection for materials that came into existence on or before January

take a second bite at the apple” and relitigate previously decided matters. *Greenwald v. Orb Communications & Marketing, Inc.*, 2003 WL 660844, at *1 (S.D.N.Y. Feb. 27, 2003).²

Rambus’s request for reconsideration fails to establish that any one of these bases for reconsideration exists here. Indeed, the only express discussion of these requirements for reconsideration is relegated to a single, introductory footnote in Rambus’s 21-page memorandum. *See* Rambus Mem. at 1 n.1.

1. Rambus Has Identified No Clear Error in the Waiver Order

The standard for clear error to warrant reconsideration of an earlier decision is “stringent.” *Gindes v. United States*, 740 F.2d 947, 950 (Fed. Cir.), *cert. denied*, 469 U.S. 1074 (1984). As one court has described the applicable test, “[t]o be clearly erroneous, a decision must strike [the court] as more than just maybe or probably wrong; it must . . . strike [it] as wrong with the force of a five-week-old, unrefrigerated dead fish.” *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988), *cert. denied*, 493 U.S. 847 (1989). Furthermore, the error must not only be obvious to warrant reconsideration, it must be a “manifest error” of law or fact. *Harso Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985) (emphasis added), *cert. denied*, 476 U.S. 1171 (1986). “To grant motions for reconsideration for lesser causes not only wastes judicial resources, but is also unjust to the parties that have invested the time and effort arguing on the original papers.” *First Options of Chicago, Inc. v.*

² Order Denying Respondent’s Applications for Review of February 26, 2003, Order (granting Complaint Counsel’s Motion for Collateral Estoppel) and February 28, 2003, Order (granting Complaint Counsel’s Motion to Compel Discovery Relating to Subject Matters as to Which Respondent’s Privilege Claims Were Invalidated on Crime-Fraud Grounds and Subsequently Waived); Denying Respondent’s Request for Reconsideration of the February 26 Order; and Granting Respondent’s Request for Reconsideration of the February 28 Order at 8 (Mar. 26, 2003) (“Reconsideration Order”).

Kaplan, 198 B.R. 91, 92 (E.D. Pa. 1996). The Waiver Order contains no such obvious or manifest errors.

Rambus does not identify a single controlling authority in which a court faced with analogous facts reached a result different from the manner in which Your Honor resolved these issues in the Waiver Order. To the contrary, established law firmly empowers Your Honor with the discretion to define the extent to which Rambus's voluntary disclosure of privileged information has waived its attorney-client privilege. The Waiver Order lies well within that discretion.

Although Rambus identifies four fact issues that it claims "do not appear to have been fully considered" in the Waiver Order (Rambus Mem. at 1-3), each of these factual propositions is either unsupported, irrelevant, or untrue.

First, Rambus makes the wholly immaterial point that it has produced to Complaint Counsel the same formerly privileged information that it has produced to other litigants. Yet Complaint Counsel's position *vis-à-vis* other parties with whom Rambus is in litigation has no bearing here.

Similarly, Rambus places emphasis on the precise scope of the compelled disclosures in the *Micron* and *Infineon* cases, suggesting that these disclosures should somehow delimit Rambus's disclosure obligations here. However, as explained in more detail below, the issue here relates not to Rambus's compelled disclosures in those cases, but rather to its subsequent, voluntary disclosure to Hynix and the resulting waiver of the attorney-client privilege relating to the subject matters of what was voluntarily disclosed.

Next, Rambus attempts to argue that it has not sought to use the privilege for tactical advantage. But as discussed in more detail below, this assertion is both legally irrelevant and factually untrue.

Finally, Rambus contends that it anticipated JEDEC-related litigation with Hitachi as early as mid-1999. However, it has offered no evidence of any kind to support either the date it began to prepare for the Hitachi litigation or that the litigation was in fact related to its misconduct at JEDEC. Moreover, it has failed even to provide a date more specific than “mid-1999.” Accordingly, Rambus fails to establish that the date set by Your Honor is clearly erroneous. Even assuming the truth of Rambus’s unsupported assertions about the date on which it first anticipated litigation with Hitachi, it is not apparent to Complaint Counsel that there would be any basis for applying a date earlier than October 1, 1999. In the interest of resolving

based his ruling, *sua sponte*, on a rationale that Your Honor determined Rambus had not yet had an adequate opportunity to brief. Reconsideration Order at 13. Accordingly, Your Honor concluded that Rambus's inadequate opportunity to be heard on this issue threatened manifest injustice and warranted reconsideration. *Id.* at 14.

In marked contrast, Rambus has been on notice of Complaint Counsel's waiver theory at least from the time Complaint Counsel first filed its Motion to Compel in January. Rambus has since enjoyed three separate opportunities to submit briefs addressing whether and to what extent its voluntary disclosure of privileged information to Hynix constituted a waiver of privilege.³ Indeed, weeks before Your Honor's Waiver Order was issued, Rambus admitted that "the issue [of whether Rambus has waived the attorney-client privilege . . . by virtue of its production . . . to Hynix] has been fully briefed by the parties." Response of Rambus Inc. to Complaint Counsel's Supplemental Memorandum in Support of Their Motion to Compel Discovery on Crime-Fraud and Waiver Grounds at 20 (filed Apr. 17, 2003) (emphasis added). Rambus's claims of manifest injustice are therefore utterly without merit.

3. Rambus Has Identified No Legal or Evidentiary Change Since the Waiver Order Issued

reconsideration comes to identifying new evidence is the fact that Rambus now makes assertions, without citation to supporting evidence, concerning the timing of the commencement of the *Hitachi* litigation and the issuance of a pre-litigation demand letter. Rambus's failure to identify this information in prior briefing is not good cause for reconsideration of Your Honor's ruling, and does not appear to bear upon the core substance of the ruling. In short, that information is not "new," but rather only newly presented.

B. Rambus Has Demonstrated No Error in the Subject-Matter Waiver Ruling

Rambus has failed to demonstrate any clear errors of law or fact contained in, or any manifest injustice stemming from, the Waiver Order. Consequently, Rambus is not entitled to reconsideration of the ruling. This is not, however, a situation in which an arguable error rises to the level of clear error. The fact is that Rambus has failed to demonstrate any error whatsoever in the ruling.

As a threshold matter, Rambus's request for reconsideration fails to rebut what has now been established conclusively, as acknowledged in the Waiver Order: Rambus waived the attorney-client privilege through its voluntary disclosure of attorney-client communications in the context of the *Hynix* litigation. *See* Waiver Order at 4 ("Voluntary disclosure means the documents were not judicially compelled.") (quoting *Chubb Integrated Sys. Ltd v. Nat'l Bank of Washington*, 103 F.R.D. 52, 63 n.2 (D.D.C. 1984)); *id.* ("Short of court-compelled disclosure, or other equally extraordinary circumstances, we will not distinguish between various degrees of 'voluntariness' in waivers of the attorney-client privilege.") (quoting *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989)). Because Rambus does not offer any reasons to disturb the conclusion that its waiver was voluntary, the only remaining question is how broad a waiver

resulted from Rambus's voluntary disclosure.⁴ The Waiver Order resolves this question in a well-reasoned and appropriate manner, and Rambus's request for reconsideration fails to identify any error whatsoever in this Court's application of governing legal principles.

1. Disclosure for Tactical Advantage, While Present Here, Is Not a Prerequisite for Subject-Matter Waiver

Rambus's entire argument hinges upon an effort to supplement the doctrine of subject-matter waiver by adding a new element not supported by the case law. Specifically, Rambus now contends (despite having not argued this in prior briefing on the

some prejudice or unfairness for subject-matter waiver to apply. *Id.* As explained below, the law imposes no such limitation on the rule of subject-matter waiver. Yet, even if Rambus's proposed limitation were legally correct, reconsideration still would not be warranted. Rambus did make its initial, partial disclosure for tactical reasons, and that disclosure, if limited to what

Subsequent to its *Sealed Case* decision in 1982, the D.C. Circuit has consistently described and applied the rule of subject-

respect to all “communications about the matter actually disclosed.” *Weil*, 647 F.2d at 25 (emphasis added). The subject-matter waiver applied without any showing of prejudice or tactical advantage. More recent Ninth Circuit cases confirm that a subject-matter waiver does not require a showing that the disclosing party sought a tactical advantage. *See, e.g., United States v. Plache*, 913 F.2d 1375, 1380 (9th Cir. 1990) (“Plache voluntarily disclosed his privileged attorney communication, thereby waiving the privilege on all other communications on the same subject.”) (citing *Weil*, 647 F.2d at 25). Other courts confirm that subject-matter waiver is not limited to instances in which the disclosing party sought a tactical advantage, or the discovering party has suffered some demonstrated form of prejudice. *See, e.g., In re Grand Jury Proceedings*, 219 F.3d 175, 189-90 (2d Cir. 2000) (deferring to the district court to determine whether a broad waiver was appropriate, even though it was unclear whether defendant used the advice of counsel as a sword and the court could discern no prejudice to the government); *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 485 (S.D.N.Y. 1993) (emphasizing that cases finding subject-matter waiver “do not require the discovering party to demonstrate prejudice, such as, for example, proof that the privilege holder has disclosed only favorable materials”).

The cases relied upon by Rambus do not in fact support the leges d20.16 93.84 0 3do n29.92 -ap..h aject

Rambus did seek to gain tactical advantage through its voluntary disclosure of privileged materials in the *Hynix*

First, Rambus avoided the possibility of having to litigate for purposes of its suit against Hynix the merits of requiring a broader scope of production of privileged materials than it was compelled to disclose in *Infineon* and *Micron*.⁷ That alone establishes that Rambus obtained some tactical advantage through its partial disclosure.

Second, limiting its voluntary disclosure to materials Rambus previously produced in the *Infineon* and *Micron* cases permits Rambus to advance arguments relating to the involvement of its own lawyers in amending patent applications to cover JEDEC's SDRAM standards, while preventing effective challenge to those arguments. This strategy has prejudiced Complaint Counsel and all of Rambus's future litigation opponents.

Specifically, Rambus has sought in this proceeding to distinguish between its attempts to broaden its patent applications to cover on-going work at JEDEC from late 1991 to June 1996, when it was a JEDEC member, from its follow-on, post-June 1996 efforts to broaden its patent applications to obtain patents containing claims covering JEDEC-compliant SDRAM and DDR SDRAM. Complaint Counsel, on the other hand, maintains that Rambus engaged in a continuous anticompetitive scheme to modify its patent applications to ensure that they covered JEDEC-compliant SDRAM and DDR SDRAM. This practice was a central element of Rambus's strategy from the outset, and has continued seamlessly through its current patent litigation efforts.

Stone: “[A]n order that says we have to produce privileged material is an order of some great moment . . . we need to take all appropriate steps to protect privileged material . . .”).

⁷ The fact that at some later point, Rambus might be compelled by the *Hynix* court to produce additional documents has no relevance; what matters is that Rambus sought to gain a tactical advantage through its disclosure. Tellingly, Hynix apparently has not subsequently sought further discovery of ostensibly privileged materials, which further supports the inference that Rambus's agreement with Hynix for partial voluntary disclosure secured a tactical advantage by forestalling Hynix from seeking further disclosure.

To rebut this argument, Rambus will likely contend that a patent attorney who joined Rambus after June 1996 (Neil Steinberg) successfully developed a way to broaden Rambus's patent claims to cover JEDEC technology

disclosing privileged information created only through June 1996, but not privileged information created at any later period, Rambus prejudices Complaint Counsel's ability to demonstrate the

2. Rambus's Waiver Properly Extends to All Documents on the Subject Matter, and Is Not Limited in Temporal Scope

Complaint Counsel has established in its previous briefing the proposition that “a waiver of the privilege in an attorney-client communication extends ‘to all other communications relating to the same subject matter.’” *In re Sealed Case*, 877 F.2d 976, 980-81 (D.C. Cir. 1989) (quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982)); accord *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). Complaint Counsel also has previously established conclusively that this legal principle applies here.¹¹ Indeed, the Waiver Order specifically concludes that this principle is a “well-established proposition” that applies in these circumstances, Waiver Order at 5, and Rambus does not contend otherwise.

The scope of subject-matter waiver falls well within this Court's discretion. *In re Sealed Case*, 877 F.2d at 981 (“Since such determinations [of whether to impose a subject-matter waiver upon finding an inadvertent disclosure of privileged information] properly depend heavily on the factual context in which the privilege is asserted, we will not disturb a district court's decision as to the question unless it can be shown the court abused its discretion.”); *In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994) (same); accord *In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 159 F.R.D. 307, 309 (D.D.C. 1994) (“[A] trial court ret.C.(Ben 0 TDCase) Tj TD4);

that Rambus's waiver of privilege for pre-June 1996 documents concerning the identified subject matters also waived the privilege for documents from post-June 1996 on the same subject matters is well within the Court's authority. Nowhere in its Motion for Reconsideration does Rambus demonstrate that Your Honor clearly erred in exercising discretion not to limit the scope of waiver.

Declining to limit the scope of Rambus's subject-matter waiver to a defined time period is entirely appropriate. Subject-matter waiver is a function of the topic, not a time period. As recognized in the Order, a privilege waiver extends to "all communications on the same subject matter." *Chiron Corp. v. Genentech, Inc.*, 179 F. Supp. 2d 1182, 1186-87 (E.D. Cal. 2001) (quoting *Micron Separations, Inc. v. Pall Corp.*, 159 F.R.D. 361, 363 (D. Mass. 1995)). Accordingly, courts have rejected attempts to inject a temporal element into the subject matters covered by a waiver. As one court has stated, "[I]t is not appropriate . . . for the . . . judge to limit the waiver on a temporal basis," as "voluntary disclosure of a privileged attorney/client communication constitutes a waiver of the attorney-client privilege as to all communications on the same subject matter." *McCormick-Morgan, Inc. v. Teledyne Industries, Inc.*, 765 F. Supp. 611, 613-14 (N.D. Cal. 1991); *see also Gabriel Capital, L.P. v. Natwest Finance, Inc.*, 2001 WL 1132050, at *1 (S.D.N.Y. 2001) ("[T]he temporal restriction urged by NatWest . . . is rejected. . . . [C]ommunications are discoverable, regardless of when they occurred."); *Chiron*, 179 F. Supp. 2d at 1188 (declining to limit subject matter waiver to pre-complaint time period); *Bowne of N.Y. City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 487 (S.D.N.Y. 1993) (finding "no basis for imposing" limits on "the temporal scope of the waiver," even though the waiving party purported to have limited the time frame covered by its waiver). Therefore, there is no basis to limit the temporal scope of Rambus's waiver.

The original limitation in the *Infineon* case to documents only from December 1991 through June 1996 is of no relevance for two reasons.

First, it is clear from the transcript of the *Infineon* hearing that the temporal limitation in that case arose only from the suggestion of counsel, who was pressed to identify a time period extemporaneously, not because the subject matter of the relevant documents was cabined within the specified dates. See Transcript of Telephone Conference, *Rambus Inc. v. Infineon Technologies AG* at 9 (Apr. 6, 2001) (attached to Rambus Mem., Tab D). Accordingly, the subject matter at issue is not inherently limited to the documents already produced, as Rambus now argues. See Waiver Order at 6 n.9 (“The Court does not read the transcript to establish that the *Infineon* court would not have permitted post-1996 discovery had counsel so requested.”).

Second, the cases cited by Rambus do not support the proposition that the subject matter as to which privilege was waived is confined by Judge Payne’s date limitation in *Infineon*. Rambus voluntarily disclosed to Hynix documents relating to the six topics identified in the

Even though Rambus’s direct participation in JEDEC ended in that time period, the record makes clear that Rambus continued to monitor JEDEC activities closely for years thereafter. The record also demonstrates that Rambus’s JEDEC-related activities created substantial legal concerns within the company and, in particular, in the minds of Rambus’s in-house and outside counsel. One of the principal legal concerns, as we have explained elsewhere, was that the misleading nature of Rambus’s conduct could render the company’s JEDEC-related patents unenforceable on equitable estoppel grounds. Such concerns might have been mitigated to some extent by Rambus’s June 1996 withdrawal from JEDEC, but there is no reason to believe that such concerns would have ceased to exist after Rambus withdrew from the organization. (As Your Honor knows, it was not until several years later that Rambus began to enforce its JEDEC-related patents.) In fact, Complaint Counsel has alleged that such concerns may have contributed to Rambus’s decision to initiate a “document retention” policy in mid-1998. In any event, if – as Complaint Counsel suspects – there are post-June 1996 attorney-client communications relating to Rambus’s participation in JEDEC that have not previously been disclosed, the Waiver Order establishes Complaint Counsel’s right to obtain such communications as a consequence of Rambus’s voluntary waiver of privilege on these JEDEC-related subject matters. To deny Complaint Counsel access to such documents under the circumstances present here would indeed cause a manifest injustice.

The sole case cited by Rambus does not support its policy argument. It supports only the limited policy argument that victims of crimes would be reluctant to provide relevant information if doing so potentially waived privilege claims in subsequent civil litigation. *See Nolan v. City of Yonkers*, 1996 WL 120685, at *3 (S.D.N.Y. 1996). Here, however, Rambus was not voluntarily providing documents to Hynix as a victim in order to aid a prosecution. Furthermore, Rambus's cooperation with a government agency was not the act that constituted the waiver. Accordingly, the principle in *Nolan* has no "implications for Commission practice" in this case.

C. The First Date at Which Rambus May Claim Work-Product Protection Is Not Clearly Erroneous

Rambus's request to advance the date on which work-product protection applies is without support. Indeed, Rambus does not even propose a specific date, but rather submits only "mid-1999" as the correct point at which it can begin to assert work-product protection. As the party seeking to invoke the work-product doctrine, Rambus bears the burden to show that the doctrine's protection applies. *See United States v. Philip Morris Inc.*, 212 F.R.D. 421, 424 (D.D.C. 2002). Rambus has not met its burden. The Waiver Order specifically admonishes Rambus for its "obfuscation . . . as to when it anticipated" JEDEC-related litigation and has noted that Rambus's filings on this issue "pointedly do *not* address when Respondent first anticipated litigation." Waiver Order at 8-9. Even now, Rambus has failed to demonstrate when it began to anticipate litigation concerning its misconduct at JEDEC, and requests only a vague "mid-1999" date for the beginning of its protection. In support, Rambus points only to its filing of a lawsuit against Hitachi in early 2000 and asserts (without supplying documentary support) that it sent a demand letter to Hitachi in October 1999.

In order to set a date certain for when Rambus may begin to claim work-product protection, Complaint Counsel submits that October 1, 1999, is an appropriate date. That date recognizes that preparation of a demand letter takes some amount of time. It does not, however, credit Rambus with a greater amount of preparation time for which it has offered no support. Accordingly, without conceding when Rambus actually began to anticipate relevant litigation, Complaint Counsel does not oppose a clarification of the Waiver Order to set October 1, 1999, as the date at which Rambus may begin to assert valid claims of work-product protection.

II. RAMBUS'S REQUESTS FOR CLARIFICATION ARE CONTRARY TO THE WAIVER ORDER

None of the bases for clarification that Rambus asserts have merit. To the contrary, the Waiver Order clearly establishes that these requests have been considered and rejected by Your Honor. Moreover, Rambus appears to be using its request for clarification as yet another

Indeed, as explained above in Sec

argument); 1 *id.* 219:18-25. More importantly, Rambus's foreign patents are based on identical applications as its U.S. patents and therefore relate to the same subject matter. Indeed, Rambus's enforcement of its foreign patents could have substantially the same impact on U.S. commerce as would enforcement of its U.S. patents, and for that reason the Commission has included Rambus's foreign patent rights within the scope of the relief it seeks. *See* Complaint, Notice of Contemplated Relief ¶¶ 3-4. Although Complaint Counsel does not believe that Rambus's waiver is so limited, it does believe that production consistent with the above clarification would provide it with substantially all of the privileged documents directly relevant to the allegations contained in the Commission's Complaint.

III. CONCLUSION

For the reasons stated herein, Respondent's Motion for Reconsideration and/or Clarification of the May 13, 2003, Waiver Order should be denied. Complaint Counsel would, nevertheless, not oppose two minor modifications of the Order. First, Complaint Counsel would not oppose substituting October 1, 1999, as the earliest date on which Rambus can assert work-product protection pertaining to documents encompassed by the Waiver Order. Second, Complaint Counsel would not oppose clarifying topic 3 in the manner outlined above. *See supra* p. 24-25.

Respectfully submitted,

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Tabs not included in public version.

CERTIFICATE OF SERVICE

I, Brian Beall, hereby certify that on May 28, 2003, I caused a copy of the following materials:

Opposition to Rambus Inc.'s Request for Reconsideration and/or Clarification of May 13, 2003, Order Regarding Documents for which Rambus Asserts Privilege

to be served upon the following persons:

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